Nos. 20643 and 20644

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GILA RIVER RANCH, INC., a corporation,
and RUSSELL BADLEY and CELESTE BADLEY,

Appellants

v.

UNITED STATES OF AMERICA,

Appellee

GILA RIVER RANCH, INC., a corporation,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLEE

EDWIN L. WEISL, JR.,
Assistant Attorney General.

WILLIAM P. COPPLE,
United States Attorney,
Phoenix, Arizona, 85025.

RICHARD S. ALLEMANN,
Assistant United States Attorney,
Phoenix, Arizona, 85025.

ROGER P. MARQUIS,
EDMUND B. CLARK,
Attorneys, Department of Justice,
Washington, D. C., 20530.

I N D E X

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument:	
The agreed remittiturs were properly subtracted from the rejected verdicts before interest was computed	4
Conclusion	8

CITATIONS

Cases:

Bishop v. United States, 288 F.2d 525	7
Dimick v. Schiedt, 293 U.S. 474	5
Duckett & Co. v. United States, 266 U.S. 149	9
O'Brien v. Hobart, 249 F.2d 654	6
United States v. Certain Parcels of Land in Rapides Parish, La., 149 F.2d 81	5
United States v. Dunnington, 146 U.S. 353	9
United States v. Kennesaw Mountain Battlefield Ass'n, 99 F.2d 830	5
United States v. 93.970 Acres of Land, Etc., 258 F.2d 17, rev'd on other grounds, 360 U.S. 328	5

Federal Rule:

Rule 58, F.R.Civ.P.	8

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 20643 and 20644

GILA RIVER RANCH, INC., a corporation, and RUSSELL BADLEY and CELESTE BADLEY,

Appellants

v.

UNITED STATES OF AMERICA,

Appellee

GILA RIVER RANCH, INC., a corporation,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLEE

OPINION BELOW

The district court did not write a formal opinion on the subject matter of these appeals. The order entering the final judgments, however, does contain the court's reasons for its decision (R. 76).

JURISDICTION

The jurisdiction of the district court over these condemnation actions was invoked under 28 U.S.C. sec. 1358.

Judgments were entered on November 16, 1965 (R. 78-84). Timel notices of appeals were filed (R. 85, 86). Jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTION PRESENTED

Whether parties who consent to a remittitur of a con demnation verdict rather than a new trial are entitled to interest on the amount remitted.

STATEMENT

The relevant facts on these appeals are not in dispute and may be summarized as follows:

The United States condemned flowage easements over the tracts involved (78.79 acres and 18,866.5 acres). On November 27, 1964, a jury returned verdicts of $6,400 for the small tract and $1,132,000 for the larger one as just compensa tion (R. 29, 30). On February 11, 1965, judgments were entere in the foregoing amounts "together with interest as provided by law" (R. 33, 35). By February 25, 1965, the United States had deposited in court and defendants had withdrawn $1,250,887. with respect to the large tract and $6,400 for the small one.

pon timely motion by the United States for new trial on the rounds that the award was excessive (R. 36-39), the district ourt ruled that (R. 42):

> The verdict should be reduced in Cause No. 3586 in the amount of $125,000.00, and in Cause No. 4571 in the amount of $800.00. If the defendant landowner, within 30 days from filing of this opinion, will file a stipulation to accept judgments on the verdicts in the two cases reduced by the above amounts, then the motion for new trial will be denied, otherwise the motion will be granted.

Both Gila River Ranch and the Badleys (the parties nterested in the larger tract) agreed to the $125,000 re- ittitur (R. 43-44) and Gila River Ranch agreed to the $800 emittitur (R. 46-47). The court on July 13, 1965, approved he remittiturs (R. 45, 48). The United States moved to vacate he January 29 judgments and enter judgments on the verdicts as emitted (R. 51-54). Defendants objected on the grounds that nterest should be calculated on the amounts of the rejected erdicts and the remittiturs subtracted from those totals R. 55-60). The Badleys objected to being charged with any f the remittitur because they had contracted with Gila River s to their share on distribution (R. 67-70). The district ourt granted the Government's motions (R. 75-77) stating (R. 76):

> It is my determination now, and was my intention at the time the memo decision was filed, that the remittitur in each case was a reduction in the amount of the verdict. It was so worded as it said the stipulation was to accept "* * * judgments on the verdicts in the two cases reduced by the above amounts. * * *" The verdicts were to be reduced and the judgments entered on the verdicts as so reduced. I am granting plaintiff's motions for entry of judgments. They are in effect amended judgments. I consider this ruling in accord with O'Brien v. Hobart, 249 F.2d 654 (1 Cir. 1957).

Judgments were accordingly entered on November 18, 1965, for $1,007,000 with interest as to the large tract and $5,600 as to the smaller (R. 78-84). Interest on the large sum was $90,762.75 for a total award of just compensation of $1,097,762.75 (R. 79). Defendants, however, as noted earlier had withdrawn $1,250,887.75 and $6,400 so refunds to the Government were ordered in the amounts of $153,125 and $800 (R. 80, 83). These appeals followed (R. 85, 86).

ARGUMENT

THE AGREED REMITTITURS WERE PROPERLY SUBTRACTED FROM THE REJECTED VERDICTS BEFORE INTEREST WAS COMPUTED

Appellants do not seriously question the court's authority to order the remittitur upon consent of the parties

remitting. The law on that score is too well settled to merit discussion. Dimick v. Schiedt, 293 U.S. 474, 482-485 (1935). The validity of ordering a remittitur by consent in lieu of a new trial in a condemnation case is also established. United States v. Certain Parcels of Land in Rapides Parish, La., 149 F.2d 81, 83 (C.A. 5, 1945); United States v. Kennesaw Mountain Battlefield Ass'n., 99 F.2d 830 (C.A. 5, 1938).

Appellant, Gila River Ranch, infers that the district court was without jurisdiction to vacate the first judgment and enter a new judgment based upon the remittitur (Br. 6, 12-13). There is no merit to this contention. As the Court of Appeals for the Seventh Circuit held in analogous circumstances, United States v. 93,970 Acres of Land, Etc., 258 F.2d 17, 21 (1958), reversed on other grounds, 360 U.S. 328 (1959):

> It is hardly open to doubt but that the first judgment standing alone was final and, therefore, appealable. It is equally certain that the Court, either on its own volition or at the instigation of the parties, possessed the authority within an appropriate time to vacate, modify or amend that judgment. We also think that in determining the question of the finality of the first judgment it should not be confined in a vacuum, separate and apart from the proceedings which followed.

The practice of vacating and entering a new judgment after remittitur was also recognized in O'Brien v. Hobart, 249 F.2d 654 (C.A. 1, 1957). Indeed a contrary view carried to its logical extreme would indicate that the first judgment could not be vacated and a new judgment entered even after a new trial. A consent remittitur as an alternative to granting a timely filed motion for a new trial has the same effect upon jurisdiction over the first judgment as an award after a new trial. In short, the remitted verdict substitutes for the award after a new trial had appellants refused to remit.

As to appellant Gila River Ranch's argument that the remittitur to which it consented should be subtracted from the rejected verdict plus interest calculated thereon, it is perhaps enough to state that O'Brien v. Hobart, 249 F.2d 654 (C.A. 1, 1957) in similar circumstances held at 654:

> In the absence of language by the trial judge in his original memorandum expressly stating that the remittitur was to be subtracted from the verdict plus interest, this court considers that the remittitur was to be subtracted from the verdict only. Here interest was not an element of damages considered by the jury. It is an item which

> was added to the verdict by the clerk. It was the verdict of the jury for $61,000 that the trial judge considered excessive. It was his judgment that a verdict for more than $48,000 should not have been rendered.

In the instant case the trial judge specified in his memorandum directing remittitur or new trial that remittitur was to be made from the verdict (Statement, supra, p. 3), and reiterated that in his subsequent order to enter a new judgment (Statement, supra, p. 4). Gila River Ranch's insistence that it consented only to remit $125,000 and $800 from the rejected verdicts, plus interest, is at best a claim that it did not comply with the court's clearly stated condition. Appellant's extended quotation from Bishop v. United States, 288 F.2d 525 (C.A. 5, 1961) (Br. 8-9) demonstrates the applicability of O'Brien v. Dobart to this condemnation case. Nothing could be more clear than that interest is a part of compensation only insofar as it is computed upon a verdict ascertaining market value at the time of taking. Here it is the verdict as reduced by the remittitur that represents fair market value and it is upon that amount that interest was properly computed.

It would be inappropriate for a jury in a condemnation case to return a verdict inclusive of interest. Indeed, in the usual case, it would be inappropriate for the district court to enter judgment with interest added at this stage. This is because interest runs from the date of taking to the date of complete payment of compensation, adjustments being made for any deposits prior thereto. Consequently, the court's judgment so provides rather than calculating the interest to that date.[1/]

CONCLUSION

For the foregoing reasons, we submit that the judgments should be affirmed as to subtracting the amounts agreed to be remitted from the verdicts prior to the computation of interest. We note also that appellants, Badleys, do not contest this. Since the other points raised by appellants in their briefs relate only to a dispute between them as to apportionment

---

1/ We deem inapplicable Rule 58, F.R.Civ.P. providing for automatic entry of judgment by the clerk of the district court.

f the award, we deem it inappropriate to comment on the merits f their respective claims. See Duckett & Co. v. United States, 66 U.S. 149 (1924); United States v. Dunnington, 146 U.S. 353 1892).

Respectfully submitted,

EDWIN L. WEISL, JR.,
Assistant Attorney General.

WILLIAM P. COPPLE,
United States Attorney,
Phoenix, Arizona, 85025.

RICHARD S. ALLEMANN,
Assistant United States Attorney,
Phoenix, Arizona, 85025.

ROGER P. MARQUIS,
EDMUND B. CLARK,
Attorneys, Department of Justice,
Washington, D. C., 20530.

ULY 1966

CERTIFICATE OF EXAMINATION OF RULES

I certify that I have examined the provisions of ules 18 and 19, of the United States Court of Appeals for the inth Circuit, and that, in my opinion, the tendered brief con- orms to all requirements.

Edmund B. Clark

EDMUND B. CLARK
Attorney, Department of Justice
Washington, D. C., 20530